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No. 03-701

In The

Supreme Court of the United States

JAMES S. and REBECCA DEATON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fourth Circuit

REPLY OF PETITIONER

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QUESTIONS PRESENTED

Because the government's brief recharacterizes petitioners' questions presented, they bear repeating in this Reply.

A three-foot wide roadside drainage ditch runs alongside the property of James and Rebecca Deaton in rural Wicomico County, Maryland. The roadside ditch was built and is maintained by the county roads department and connects to a ditch system operated by a public association established under state law to address local drainage problems. The Deatons dug a ditch on their property and, in so doing, disturbed an area the United States Army Corps of Engineers considers a wetland. There is no showing that common dirt—the pollutant at issue—left the Deatons' property, flowed into the roadside ditch, or reached any truly navigable waters.

The questions presented are:

1. Are the roadside ditch and the wetland next to it "navigable waters" under the Clean Water Act?
2. Where activity in a wetland has not degraded either a nonnavigable roadside ditch next to the wetland or a downstream traditional navigable water, does Congress's commerce power over navigation allow federal regulation of that wetland or that roadside ditch?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

I. The Conflict in the Circuits 1

II. Statutory Issues 4

A. Policy 4

B. Significant Nexus 5

C. Open Water 6

D. Deference 7

III. Constitutional Issues 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Page(s)

Citizens Bank v. Aalfabco, Inc., 539 U.S. 52 (2003) 10

In re Needham, 354 F.3d 340, (5th Cir. 2003)..... *passim*

Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001)..... 1, 2, 6

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001)..... *passim*

Treacy v. Newdunn Assocs. LLP, 334 F.3d 416, *petition for cert. filed*, 72 U.S.L.W. 3310 (U.S. Oct. 27, 2003) (No. 03-637)..... 1

United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974) 9

United States v. Deaton, 332 F.3d 698 (4th Cir. 2003)..... 2, 6, 7, 8, 9

United States v. Hartsell, 127 F.3d 343 (4th Cir. 1997) 9

United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3451 (U.S. Dec. 22, 2003) (No. 03-929)..... 1, 2

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 5, 6, 8

STATUTES

Clean Water Act, 33 U.S.C. § 1251 *et seq.* 1

33 U.S.C. § 1251(b) 8

33 U.S.C. § 1317..... 9

33 U.S.C. § 1342..... 4

33 U.S.C. § 1362(14) 4

REGULATIONS

14 C.F.R. § 91.305 7

15 C.F.R. Pt. 921, App. II 7

33 C.F.R. § 329.4 4

40 C.F.R. § 125.83 7

43 C.F.R. Pt. 11, App. II 7

49 C.F.R. § 176.415(c)(4) 7

Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (2003) 3, 4

OTHER

Boat Jam, The Macomb Daily, June 23, 2003, *available at* http://www/zwire.com/site/news.cfm?newsid=8560595&BRD=988&PAG=461&dept_id=141265&rfi=8 7

Memorandum from Charles Hess, Chief, Operations Division, Civil Works, U.S. Army Corps of Engineers, to All Commanders, Major Subordinate Commands and District Commands (May 11, 2001), *available at* http://www.eswr.com/corpsmem51101.pdf 3

U.S. Army Corps of Engineers, *Regulatory Statistics - FY2002*, p. 2, *available at* http://www.usace.army.mil/inet/functions/cw/cecwo/reg/2002webcharts.pdf 3

This case raises issues of national importance. Eleven separate amici curiae briefs have been filed on behalf of 36 entities and millions of citizens urging the Court to hear this case. Two other cases on petition for this Court's review adopted the holding and reasoning of the decision below. *Treacy v. Newdunn Assocs. LLP,* 334 F.3d 416, *petition for cert. filed*, 72 U.S.L.W. 3310 (U.S. Oct. 27, 2003) (No. 03-637); *United States v. Rapanos,* 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3451 (U.S. Dec. 22, 2003) (No. 03-929).

The split in the circuits is sharp. The Fifth Circuit has explicitly and unequivocally rejected the Fourth Circuit's legal theory, holding that it is "unsustainable under [this Court's decision] in *SWANCC*." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001) ("*SWANCC*").

The core legal question is whether the Fourth Circuit erred in holding a roadside ditch and wetlands next to it to be "navigable waters" under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA"), simply because those areas have "some" connection to navigable waters. A physical course across the landscape, through which water may "eventually flow," was the only evidence the court of appeals found necessary to so hold.

I. The Conflict in the Circuits

The government argues that the decision below does not "squarely conflict" with *Rice v. Harken*, 250 F.3d 264 (5th Cir. 2001), already discussed, Pet. 12-13, or *In re Needham*, 354 F.3d 340 (5th Cir. 2003), decided six weeks ago. Opp. 16. Calling two mountains one valley does not hide the mountains. The split is profound.

In *Needham*, the Fifth Circuit explicitly considered and rejected the government's argument that statutory "navigable waters" means "all waters . . . that have any hydrological connection with 'navigable water.'" *Needham,* 354 F.3d at 345. The Fifth Circuit recognized that the Fourth Circuit had "agreed with this expansive interpretation," thereby "asserting authority under the CWA

over wetlands that are 'adjacent to, and drain into, a roadside ditch whose waters eventually flow into the navigable Wicomico River and Chesapeake Bay....'" *Id.* at 345 (citing *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003)). It also recognized that the Sixth Circuit had followed *Deaton* in *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003). But, after considering the jurisdictional assertions upheld in those cases, it declared them "unsustainable under *SWANCC*."

> The CWA and the [Oil Pollution Act] are not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor truly adjacent to navigable waters. *See Rice,* 250 F.3d at 269. Consequently, *in this circuit* the United States may not simply impose regulations over puddles, sewers, *roadside ditches* and the like; under *SWANCC,* "a body of water is subject to regulation...if the body of water is actually navigable or adjacent to an open body of navigable water." *Rice,* 250 F.3d at 269.

Needham, 354 F.3d at 345 (emphasis added).[1] The Fifth Circuit explicitly and plainly split with the Fourth Circuit on the definition of "navigable waters." The government's spin to the contrary is simply wishful thinking.

The Fourth and Fifth Circuits are also in conflict on whether deference is due the government's litigation position. In *Deaton*, the Fourth Circuit deferred to the "eventually flows" theory, reasoning that the government's position "does not invoke the outer limits of Congress's power or alter the federal-state framework." Pet. 14a. In *Needham*, however, the Fifth Circuit refused to defer because the position advanced by the government pushes

> to the outer limits of the Commerce Clause and raise[s] serious constitutional questions. . . . *Rice*

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[1] The court held likewise that "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway." *Id.* at 347.

> and *SWANCC* have rejected such an expansive reading of the OPA and CWA respectively. Accordingly, the regulation is not entitled to *Chevron* deference.

Needham, 354 F.3d at 346, n.8. Certiorari is warranted not only to resolve the split on the meaning of "navigable waters," but also to give guidance to the lower courts on the deference to be afforded the government.

The practical consequences of the split are enormous. Corps headquarters has forbidden its field offices from developing their own written guidance on which waters are "navigable waters."[2] The only applicable national guidance for field staff, who make 68,000 "navigable water" determinations each year,[3] is a Joint Memorandum issued in January 2003. That memorandum instructs field staff to work "case by case" and consider "relevant court decisions." Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1998 (2003). Thus, if the Deatons' wetlands and the roadside ditch were in the Fifth Circuit, and the local Corps office followed Fifth Circuit law, they would not be federalized. But how will a staff biologist determine what decisions are relevant? Corps and EPA field offices overlap the judicial circuits. What law should be applied by the EPA regional office in Atlanta, which covers states in the Fourth, Fifth, and Eleventh Circuits? Aside from the confusion confronting Corps and EPA staff, as the amici curiae briefs filed on behalf of 36 entities and millions of citizens amply demonstrate, there is also a strong public interest in resolving these conflicts.

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[2] *See* Memorandum from Charles Hess, Chief, Operations Division, Civil Works, U.S. Army Corps of Engineers, to All Commanders, Major Subordinate Commands and District Commands (May 11, 2001), *available at* http://www.eswr.com/corpsmem51101.pdf.

[3] U.S. Army Corps of Engineers, *Regulatory Statistics - FY2002*, p. 2, available at http://www.usace.army.mil/inet/functions/cw/cecwo/reg/2002webcharts.pdf.

II. Statutory Issues

A. Policy. The government argues that it must call the roadside ditch a "navigable water" because (1) water moves in hydrologic cycles, (2) therefore, as a general matter, pollution in nonnavigable waters can affect the quality of navigable waters, and, therefore, (3) to not deem the ditch a navigable water "would subvert Congress's efforts to ensure that the quality of traditional navigable waters[4] is adequately protected." Opp. at 10-11. This logic tree is unsupported and off point.

First, it is not necessary to call the ditch a statutory "navigable water" to achieve the CWA's pollution prevention goals. The Act regulates discharges from point sources to navigable waters (such as the Wicomico River), and ditches fall with the Act's definition of point sources. 33 U.S.C. §§ 1342, 1362(14). Thus, an activity on a remote, nonnavigable tributary (perhaps a ditch) that results in the discharge of a pollutant to a truly "navigable water" can be regulated without federalizing the nonnavigable tributary (the ditch). *See, e.g.*, Hon. J. Duncan Amicus Br. at 9-10. The federal government can regulate the activity without federalizing the place.

Second, the government's policy argument, combined with the Fourth Circuit's "eventually flows" holding, would establish a categorical rule making virtually all surface water "navigable waters" if some connection to navigable waters, however tenuous, could be drawn. Municipal storm sewers "eventually flow" to navigable waters. If they were

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[4] The government says that "traditional navigable waters" are waters "that are, have been or could be used for interstate or foreign commerce." Opp. at 2-3 n.1. This definition would subvert *SWANCC sub rosa* by expanding traditional navigable waters to include all waters without regard to their capability of use to transport interstate and foreign commerce. This is contrary to *SWANCC*, 531 U.S. at 169, 172, the Corps' own regulations, 33 C.F.R. § 329.4 (navigable waters are waters that are "presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce"), and the agencies post-*SWANCC* pronouncements. 68 Fed. Reg. 1991, 1996 (2003).

treated as "navigable waters," permits would be required for any discharges into those sewers, regardless whether pollutants would ever reach traditional navigable waters. By the same token, the water in the sewer itself would be required to meet water quality standards. Duncan Br. at 7-8 n.7. Building Industry Legal Defense Foundation *et al.* (BILD) Amicus Br. at 7-8. Farm furrows, curbs and gutters likewise "eventually flow" to navigable waters and would also become navigable waters. Brief of California Farm Bureau at 6-7; BILD Br. at 7-8 (citing San Diego CWA permit claiming CWA jurisdiction over streets, curbs and gutters).

B. Significant Nexus. The government disagrees that *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and *SWANCC* limit statutory "navigable waters" to "waters having a 'significant' nexus' to traditional navigable waters." Opp. 10. Nonetheless, it insists it has proven a "significant nexus" between the wetlands on the Deatons' property and the Wicomico River based on (1) "the demonstrated risk" that pollutants in tributaries will "ultimately impair" traditional navigable waters, "together with" (2) "the proven surface water connection between the wetlands on petitioners' property and the Wicomico River..." Opp. 13.

First, it is unclear from the government's brief what, exactly, "demonstrates" the asserted "risk" to traditional navigable waters. There is no specific evidence in the record of this case demonstrating such a risk. Nor does the government cite a rulemaking or other administrative record that would establish such a risk. The only thing the government offers is that, because "[w]ater moves in hydrologic cycles," pollution in nonnavigable waters "will affect the water quality of other waters. . ." Opp. 10. If generic reference to the hydrologic cycle is sufficient to "demonstrate" a risk to navigable waters from nonnavigable sources, then that risk will exist in all cases.

Second, the government claims that the dye test demonstrates a connection between the Deatons' wetlands and the Wicomico River (Opp. 5-6). But the existence of

"a" connection does not satisfy *SWANCC*'s command for a "significant nexus." *SWANCC*, *Rice* and *Needham* demand a showing that the nonnavigable waters be "inseparably bound up" with navigable waters and that the government establish in this enforcement case a "close, direct and proximate link" between the Deatons' ditch-digging activities and "any resulting contamination of a particular body of natural surface water." *SWANCC* at 163; *Rice* at 272.[5]

C. Open Water. The government acknowledges that its authority does not "[e]xtend to ponds that are *not* adjacent to open water," Opp. 14 (citing *SWANCC,* 531 U.S. at 168 (emphasis in original)), but its brief suggests that the shallow ditch at issue in this case is "open water." This Court first used the term "open water" in a CWA case in *Riverside*, where the Court upheld CWA jurisdiction over wetlands "actually abutting" Black Creek, a navigable-in-fact waterway. In so holding, the Court stressed that it was expressing no opinion on the status of "wetlands that are not adjacent to bodies of open water," *Riverside*, 474 U.S. 121, 131 n.8. When the Court referred to "open water," it was in the context of Black Creek, *i.e.*, actually

[5] The government also distorts the facts by claiming "the ditches involved in this case . . . re-diverted a pre-existing intermittent stream [and are therefore statutory "navigable waters"] because they were not 'excavated on dry land.'" Opp. 20-21. With regard to the roadside ditch (the "focus" of this case), nothing in the record says that that ditch "re-diverted a pre-existing intermittent stream" or was not "excavated on dry land," and the government has never made that argument in the 14 years since this case began. As to the ditch the Deatons dug through their property, the parties disputed whether there was an intermittent stream on the property, but ultimately the district court determined that the presence of the alleged stream "is not material to the resolution" of the jurisdictional issue, *United States v. Deaton*, No. MTG-95-240, slip op. at 14 n.12 (D. Md. Sept. 22, 1997)(C.A. App. at 49) and went on to find jurisdiction on other grounds. So the record will not support, and no court has ever found, that the ditches in this case "re-diverted" a stream.

navigable water, which, indeed, an ordinary person would consider "open."[6]

The government's argument that the term "open water" is "a shorthand for 'rivers, streams, and other hydrographic features....,'" Opp. 15, does not help it. The roadside ditch at issue cannot reasonably be grouped in the same category as a river or stream. Indeed, the phrase "open water" is used in a variety of regulatory contexts, none of which remotely resemble this roadside ditch.[7] No ordinary person coming upon the roadside ditch would believe he had reached open water.

D. Deference. The government's claim that the Fourth Circuit "correctly deferred to the expert agencies' construction of the CWA as encompassing wetlands adjacent to tributaries of traditional navigable water" is wrong on multiple levels. Opp. at 20. First, the "eventually flows" test advanced by the government and adopted by the court below is not the work of the "expert agencies." It is a litigation position and thus warrants no deference.

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[6] Lest there be any doubt about the character of Black Creek, in June 2003, it was reported to have experienced a "boat jam." *Boat Jam*, The Macomb Daily, June 23, 2003, *available at* http//www/zwire.com/site/news.cfm?newsid=8560595&BRD=988&PAG=461&dept_id=141265&rfi=8. The roadside ditch at issue here has never experienced a boat jam, or, indeed, a boat.

[7] Other agencies have used similar commonsense definitions. *See, e.g.*, 14 C.F.R. § 91.305 (FAA regulations, restricting persons test flying aircraft "except over open water, or sparsely populated areas); 15 C.F.R. Pt. 921, App. II (2003) (NOAA regulations, defining volcanic estuaries as "coastal bodies of open water...."); 40 C.F.R. § 125.83 (EPA regulations, stating "[l]ake or reservoir means any inland body of open water with some minimum surface area free of rooted vegetation...."); 43 C.F.R. Pt. 11, App. II (Interior Department regulations, defining "landward open water" as "a body of water that does not contain vegetation, (e.g., wetland, seagrass, or kelp))"; 49 C.F.R. § 176.415(c)(4) (Department of Transportation regulations, stating that facilities at which flammable solids are loaded or unloaded "must be located so that each vessel...has an unrestricted passage to open water").

The "eventually flows"/"any connection" theory of jurisdiction is not found anywhere in the regulations. Nor has there been a rulemaking to provide an informed foundation for it. By contrast, the *Riverside* court cited an extensive rulemaking record, developed over years of public comment, showing specifically that "adjacent" wetlands provide filtration, flood control, and biological functions to the aquatic ecosystem. *Riverside,* 474 U.S. at 134-135. That kind of record is missing here.

At its core, the "eventually flows" test, which the government justifies by reference to the "hydrologic cycle," amounts to a categorical rule that allows federal regulation with no discernible limit. As such, it tests the outer limits of Congress's constitutional powers and thus can only be sustained by a "clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172. Tellingly, nowhere in its Opposition does the government respond to the Deatons' argument that a clear statement is required here. Pet. 23-27. Nor does it mention that the ditch at issue here is owned by the county roads department and feeds into a series of ditches managed by a local Public Drainage Association chartered under Maryland law, nor that the Court in *SWANCC* stressed Congress's intent in § 1251(b) of the CWA to "preserve, and protect the primary responsibilities and rights of states to . . . plan the development and use . . . of land and water resources." *SWANCC* requires a clear statement, not deference.

III. Constitutional Issues

The government leads its Commerce Clause arguments with a vague over-generalization. It argues that "the CWA may constitutionally be applied to nonnavigable tributaries and their adjacent wetlands" without "case-specific proof of harm to traditional navigable waters." Opp. 22-23. But this case is not about whether an activity (placing a pollutant in a nonnavigable tributary) may be regulated because it causes the discharge of a pollutant to a truly "navigable water" (such as the Wicomico River). Rather, it is about whether the federal government may federalize a place (in this case a remote roadside ditch), thereby

requiring a CWA permit for any placement of dirt, even if it reaches no farther than the wetland area or the ditch next to it.[8] The government claims that it may, and the Fourth Circuit agreed. As a result, the ditch rather than traditional navigable waters is the trigger for Commerce Clause authority. Thus, in the hands of the Fourth Circuit and of the federal government, Congress's "commerce power over navigation"—the constitutional authority for the CWA (*see SWANCC,* 531 U.S. at 165 n.2)—has become an afterthought rather than the premise for regulation.

The government also argues that to deprive the Corps of discretion to regulate activities such as the Deatons' would "severely undermine[]" the "regulatory regime." Opp. 25. The government offered that same argument in *SWANCC,* to no avail.[9]

Finally, the government does not squarely respond to the Deatons' argument that the Fourth Circuit erred in importing the "aggregation" principle—a concept

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[8] Thus, *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974), is beside the point. The Sixth Circuit did not hold that the nonnavigable stream where an oil spill occurred was *itself* a "navigable water." Rather, noting that drops of oil "carry no fingerprints," and the government "could not possibly prove which polluter discharged" oil found in a navigable river (precepts now outdated), *id.* at 1329, it held that the government can regulate the pollution of nonnavigable tributaries to "preserv[e] the navigability and the quality of the navigable waters." *Id.* at 1328. *Ashland* authorized the regulation of the activity (discharges), not the wholesale federalization of the nonnavigable waterbody. Here, the government is not content to regulate pollutant discharges from the roadside ditch to navigable waters. It wants to federalize the ditch, and thus control activities in and adjacent to the ditch regardless of how tenuous their relation to navigable waters. The government's other cases are similarly unavailing. *See, e.g., United States v. Hartsell*, 127 F.3d 343, 349 (4th Cir. 1997) (Congress has constitutional power to require permits under 33 U.S.C. § 1317 for the "discharge of pollutants into public sewers which would eventually flow into streams and rivers;" no finding that the sewer system *itself* was a "navigable water").

[9] See Federal Respondents Br., *SWANCC v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001), No. 99-1178, at 44.

applicable to a "substantial effects" analysis—into its "channels" analysis. *See* Pet. 19-21. The government advances the non sequitur argument that none of the cases cited by the Deatons "hold that Congress is foreclosed from relying on aggregate effects when deciding whether ... to protect the channels of commerce ... from potentially harmful upstream activities." Opp. 25. But a regulated activity is either in a channel of commerce (and thus subject to regulation under Congress's channels power) or it is not; no amount of aggregation of activities outside of a channel of commerce will place the activities inside the channel. Nor does the government cite a single case where a court relied on aggregation outside of a "substantial effects" analysis. *See Citizens Bank v. Aalfabco*, Inc, 123 S.Ct. 2037, 2040 (2003) (aggregation principle used to determine whether individual debt-restructuring transactions, *i.e.*, intrastate transactions, had a substantial effect on interstate commerce). The Fourth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). Certiorari is warranted on this basis as well.

CONCLUSION

For all the reasons set forth above and in the Petition, the Court should grant certiorari.

February 11, 2004

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